

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

THOMAS COOK; MEGAN DRESCH;  
LAURA GALABURDA; JACK GLOVER;  
DAVID HALL; MONICA HILL; JENNY  
LYNN KOPFSTEIN; JENNIFER MCGINN;  
JUSTIN PEACOCK; JAMES E.  
PIETRANGELO II; DEREK SPARKS;  
STACY VASQUEZ,

Plaintiffs,

$$\mathbf{v}_i$$

DONALD H. RUMSFELD, Secretary of  
Defense; MICHAEL CHERTOFF, Secretary of  
Homeland Security; UNITED STATES OF  
AMERICA,

Defendants.

Civil Action No. 04-12546 GAO

## CONSENT MOTION FOR LEAVE TO FILE REPLY MEMORANDUM

Defendants Donald H. Rumsfeld, Secretary of Defense; Michael Chertoff,<sup>1</sup> Secretary of Homeland Security; and the United States of America, hereby request that the parties be granted leave to file a reply memorandum in support of their motion to dismiss. In support thereof, defendants state as follows:

1. In this action, which was filed on December 6, 2004, plaintiffs, twelve gay or lesbian former members of the Army, Navy, Air Force, and Coast Guard, contend that the Act of Congress regarding homosexual conduct in the Armed Forces of the United States, see National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670-73, codified at

<sup>1</sup> On February 15, 2005, Michael Chertoff was sworn in as the second Secretary of the Department of Homeland Security, and is automatically substituted for his predecessor, Tom Ridge, pursuant to Fed. R. Civ. P. 25(d)(1).

10 U.S.C. § 654, and the implementing Department of Defense (“DoD”) Directives, are unconstitutional on their face and as applied to the plaintiffs. Specifically, plaintiffs contend that the statute and implementing DoD Directives are unconstitutional because they (1) infringe upon what plaintiffs describe as their “fundamental liberty interests,” in violation of the Fourth, Fifth and Ninth Amendments; (2) abridge their rights to freedom of speech, in violation of the First Amendment; and (3) deny them equal protection of the laws, in violation of the Fifth Amendment’s Due Process Clause. Plaintiffs seek declaratory and injunctive relief.

2. On February 7, 2005, defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). On March 28, 2005, plaintiffs filed an opposition to defendants’ motion.

3. Defendants hereby request leave to file a reply memorandum of no more than 15 pages, which defendants believe will be helpful to the Court in deciding the issues presented in the pending motion to dismiss.

4. On March 31, 2005, counsel for defendants, Assistant U.S. Attorney Mark T. Quinlivan, inquired of counsel for the plaintiffs, Stuart F. Delery, Esq., whether plaintiffs would consent to this motion. Mr. Delery graciously responded that plaintiffs would consent to this motion and, on April 4, 2005, stated in an electronic mail message that he had reviewed and consented to this motion. Defendants note that they will consent to a motion by the plaintiffs to file a sur-reply, should plaintiffs seek leave of the Court to file a sur-reply.

WHEREFORE, with good cause having been shown, defendants respectfully request that this Court grant them leave to file a reply memorandum of no more than 15 pages in support of the government’s motion to dismiss.

Respectfully submitted,

MICHAEL J. SULLIVAN  
United States Attorney

By: /s/ Mark T. Quinlivan  
MARK T. QUINLIVAN  
Assistant United States Attorney  
United States Attorney's Office  
John Joseph Moakley U.S. Courthouse  
1 Courthouse Way, Suite 9200  
Boston, MA 02210  
617-748-3606

Dated: April 5, 2005

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(a)(2)

Pursuant to Local Rule 7.1(a)(2), I certify that, on March 31, 2005, I conferred with co-counsels for the plaintiffs, Stuart F. Delery, Esq., regarding this motion; that, Mr. Delery graciously responded that plaintiffs would consent to this motion; and that, on April 4, 2005, Mr. Delery stated in an electronic mail message that he had reviewed and consented to this motion.

/s/ Mark T. Quinlivan  
MARK T. QUINLIVAN  
Assistant United States Attorney